No. 83-458

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, and
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

COMMUNITY NUTRITION INSTITUTE, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act (7 U.S.C. § 601 *et seq.*) provides procedural and substantive requirements which the Secretary of Agriculture must follow in issuing market orders. 7 U.S.C. § 608c. The questions presented in the order in which they should be considered are:

1. Whether consumers of fluid milk, who assert interests that are protected by the Agricultural Marketing Agreement Act, have standing to seek judicial review of milk market orders issued under that Act.

2. Whether the statutory scheme for reviewing milk market orders precludes judicial review by consumers under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

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BRIEF FOR THE RESPONDENTS

STATEMENT

This case involves the right of respondents Ralph Desmarais, Deborah Harrell and Zy Weinberg to challenge regulations promulgated by petitioner Secretary of Agriculture (the "Secretary"), the effect of which is to preclude them from buying reconstituted milk. Reconstituted milk is a milk product manufactured by combining water with whole or nonfat milk powder. In some cases butterfat or nondairy fats, such as coconut oil or soybean oil, may be added. Although it can be manufactured in a manner that makes it "nearly indistinguishable from fresh fluid milk," Federal and state laws require labeling which clearly differentiates reconstituted milk from fresh fluid milk. 45 Fed. Reg. 75956, 75960-61 (1980).

Respondents are three cost-conscious consumers of fresh fluid milk who desire to buy reconstituted milk but cannot do so because the Secretary's regulations create insuperable trade barriers to the marketing of reconstituted milk in the areas of the country in which they reside. In areas of the country not subject to such regulations, reconstituted milk has been sold to consumers at prices substantially lower than the prices of fresh fluid milk.[1] Despite the significant impact that the Secretary's regulations have on respondents, petitioners (the Secretary and the Department of Agriculture) assert that respondents have no right to obtain judicial review, under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"), of the legality of the regulations under the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.* ("AMAA").[2]

A. The Impact Of The Challenged Milk Market Orders

The regulations at issue are part of a comprehensive set of regulations, referred to as milk market orders, that establish minimum prices that handlers (middlemen who process or "handle" milk) in a given geographic region, or "order area," must pay milk producers (dairy farmers) in that same area. The Secretary has established milk mar-

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[1] According to the Secretary, reconstituted milk is sold in Alaska by a major Alaskan dairy "for about 15 to 20 cents per half gallon less than Alaskan produced fresh milk sold by that dairy's competitors." 45 Fed. Reg. 75956, 75960 (1980). In addition, prior to its merger with a dairy cooperative, a North Carolina dairy priced its reconstituted milk "about 10 cents per gallon below fresh fluid milk prices in that market." *Id.*

[2] The relevant provisions of the AMAA are set forth in Pet. App. at 69a-95a. (References to "Pet. App." are to the Appendix submitted as part of the Petition for A Writ of Certiorari).

ket orders for 45 geographic areas, thereby encompassing most of the nation. See 7 C.F.R. Parts 1001-1139 (1983). Although the 45 milk market orders vary in form and wording, they contain substantially the same provisions with regard to reconstituted milk.[3]

The purpose of these regulations is to assure that producers within a region receive a uniform minimum price for the fresh fluid milk they sell to regional handlers, regardless of how the fresh fluid milk is used by the handlers. See 7 U.S.C. § 608c(5). To this end, handlers do not pay the producers directly, but instead make payments into a regional pool, which is then distributed among the regional producers. 45 Fed. Reg. 75956, 75959 (1980). The amount that the handler pays is based on the use to which the handler puts the milk. *Id.* at 75958. If the milk is sold as fresh milk for fluid consumption, the handler pays the higher Class I price. *Id.* If the handler uses the milk to manufacture milk products, such as milk powder, cheese, or evaporated milk, the handler pays the lower Class II price. *Id.*

The regulations at issue in this case protect regionally produced fresh fluid milk by imposing a tax, called a

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[3] Milk market orders may be issued only after notice of proposed rulemaking and an opportunity for hearing (7 U.S.C. § 608c(3)), and upon the Secretary's finding that issuance of the order will tend to effectuate the declared policy of the AMAA. 7 U.S.C. § 608c(4). However, before the Secretary may issue a milk market order, two-thirds of the region's producers must approve it. 7 U.S.C. § 608c(9)(B).

Federal milk market orders apply to Grade A milk. Grade B milk (milk that is produced under less stringent farm sanitation standards than Grade A) cannot be sold for drinking purposes and is not regulated under the federal milk market orders. 45 Fed. Reg. 75956, 75958 (1980).

compensatory payment, on reconstituted milk, which otherwise would compete with fresh fluid milk in those markets. If a handler purchases milk powder from outside the order area and manufactures it into reconstituted milk, then under the regulations, he must report to the Department of Agriculture the amount of reconstituted milk he sells within the order area.[4]

In a process referred to as "down allocation," the regulations adopt the fiction that a handler will use reconstituted milk to manufacture Class II products,[5] but if the handler's records show that he has not manufactured enough Class II products to account for all the reconstituted milk, he is required to make a compensatory payment on the remainder.[6] The compensatory payment is equal to the difference between the higher Class I prices and the lower Class II prices. The compensatory payment is not distributed to the producers of the milk in the region where the milk powder was made. Instead, it is deposited into a pool for distribution to the producers of fresh fluid milk in the region where the reconstituted milk was manufactured and sold.[7]

It is undisputed that this pricing scheme has the effect of raising the handlers' cost of manufacturing reconsti-

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[4] 7 C.F.R. § 1012.30(b)(2) (1983). To illustrate the regulatory framework, respondents use the Tampa Bay Order, and citations to the Code of Federal Regulations refer to the relevant sections of that Order.

[5] See, e.g., 7 C.F.R. § 1012.44(a)(3)(iv) and (v) (1983).

[6] 7 C.F.R. § 1012.60(e) (1983).

[7] 7 C.F.R. § 1012.71(a) (1983). The regulations similarly prevent a handler from manufacturing reconstituted milk from milk powder produced from his own order area's fresh fluid milk. See 44 Fed. Reg. 65989, 65990 (1979).

tuted milk. Pet. App. at 5a. In each of the order areas in which the respondents reside (Central Arkansas, Texas and Tampa Bay), the compensatory payment makes it more costly for handlers to manufacture reconstituted milk than to purchase fresh fluid milk. Supplemental Affidavit of Thomas B. Smith ¶ 11, J.A. at 79-80. As shown in the following table, which is derived from evidence presented to the district court, based on April 1981 prices in the areas where respondents reside, the cost of manufacturing 100 pounds of reconstituted milk, including the compensatory payment, ranged from $1.43 to $1.56 *above* the Class I price of fresh fluid milk. Without the compensatory payment, the cost of the reconstituted milk would be $.48 to $1.32 *below* the Class I price of fresh fluid milk.[8]

April 1981 Prices
Cost Of Manufacturing 100 Pounds
Of Reconstituted Milk Compared
With Prices Of Fresh Fluid Skim Milk
(In Dollars)

Area	Federal Order Class I Price For Fresh Fluid Skim Milk	Cost Of Reconstituted Milk With Compensatory Payment	Compensatory Payment	Cost Of Reconstituted Milk Without Compensatory Payment
Central Arkansas	8.68	10.11	1.91	8.20
Texas	9.05	10.61	2.29	8.32
Tampa Bay, Florida	9.68	11.13	2.77	8.36

[8] The manufacturing cost includes the cost of the milk powder, the cost of transporting the powder from the area where it is produced to the area where it is reconstituted, the cost of warehousing the powder until it is used, and the cost of processing the powder into reconstituted milk. Affidavit of Thomas B. Smith ¶ 10, J.A. at 66.

Supplemental Affidavit of Thomas B. Smith ¶ 11, J.A. at 79-80.

The effects of this pricing scheme on respondents are two-fold: (i) it deprives them of the lower-cost reconstituted alternative; and (ii) it deprives them of the stabilizing influence that would be provided by the marketing in regions such as theirs, of reconstituted milk made from milk powder derived from regions of the country where milk supplies are more bountiful. Complaint ¶¶ 7, 26-28 and 31, J.A. at 12 and 16-17; Comments of the Antitrust Division, U.S. Dep't of Justice (Jan. 15, 1980), J.A. at 24-27; Comments of the Council on Wage & Price Stability (Feb. 29, 1980), J.A. at 30-34 and 41.

B. The Agricultural Marketing Agreement Act

The Secretary's authority to issue milk market orders was first enacted as part of the Agricultural Adjustment Act of 1933, ch. 25, §§ 8(3), (4), and (5), 48 Stat. 35. Significant amendments were enacted two years later as part of the Agricultural Adjustment Act of 1935 (ch. 641, 49 Stat. 750) because of the "delegation" problems brought to light by the then recent decision in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). At that time Congress revised the milk marketing provisions to make it clear that the Secretary's authority was limited by rules established by Congress. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 3 (1935).[9]

The regulations at issue in this case are not expressly authorized by the AMAA. The Secretary's express au-

[9] The 1935 Act was subsequently reenacted as part of the Agricultural Marketing Agreement Act of 1937, which reaffirmed the marketing order provisions of the 1935 law after a provision on processing taxes had been struck down as unconstitutional in *United States* v. *Butler*, 297 U.S. 1 (1935).

thority to set minimum prices applies only to fresh fluid milk sold by producers, and not products made from milk, such as reconstituted milk.[10] The AMAA does, however, include incidental rulemaking authority which may be exercised when necessary to carry out the provisions expressly authorized by the statute. 7 U.S.C. § 608c(7)(D). It is under this authority that the reconstituted milk regulations have been issued.

The incidental rulemaking authority, like the express authority, is constrained by various provisions of the AMAA. Congress carefully defined the policy objectives of the statute in Section 2 of the AMAA,[11] and prohibited

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[10] 7 U.S.C. § 608c(5)(A) authorizes the Secretary to issue orders:

> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers.

[11] Section 2 reads in pertinent part as follows:

> It is declared to be the policy of Congress—
>
> * * *
>
> (2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.
>
> * * *
>
> (4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural

the Secretary from issuing any market orders that do not tend to effectuate that declared policy. 7 U.S.C. §§ 602 and 608c(4). Moreover, Congress also specifically required the Secretary to terminate or suspend any market order that obstructs or no longer tends to effectuate the statutory policy objectives. 7 U.S.C. § 608c(16).

Two of the five objectives of the AMAA are directly intended to "protect the health and purses of consumers." *Schepps Dairy* v. *Bergland*, 628 F.2d 11, 19 (D.C. Cir. 1979). The first of these authorizes the Secretary to set producer prices no higher than is necessary to stabilize market conditions and give producers a fair return on their investment. 7 U.S.C. § 602(2); H.R. Rep. No. 6, 73d Cong., 1st Sess. 7 (1933). Anything more would be unfair to consumers and outside the limits of the Secretary's authority. *Id.* at 6-7. In furtherance of the interests of consumers, the second provision, added to the AMAA in 1954, instructs the Secretary to establish market conditions that will avoid unreasonable fluctuations in milk prices and supplies. 7 U.S.C. § 602(4).

The Secretary's rulemaking authority is further constrained by 7 U.S.C. § 608c(5)(G), which prohibits the Secretary from erecting barriers to the marketing of milk and milk products.[12] Thus, in *Lehigh Valley Cooperative*

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commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

7 U.S.C. §§ 602(2) and (4).

[12] 7 U.S.C. § 608c(5)(G) provides:

No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or milk product thereof produced in any production area in the United States.

Farmers v. *United States*, 370 U.S. 76, 97 (1962), this Court held that this prohibition "refers not merely to absolute or quota physical restrictions, but also encompasses economic trade barriers."[13]

As the Secretary acknowledges, this regulatory scheme affects the interests of producers, handlers and consumers. 45 Fed. Reg. 75956, 75958 (1980). Producers are the beneficiaries of the minimum prices that handlers must pay under the system, and it is consumers who ultimately must bear the cost, both in terms of the prices they must pay and in terms of the unavailability of products that cannot be competitively marketed. Yet, the AMAA does not expressly provide producers or consumers with either administrative or judicial remedies to challenge the legality of market orders.

The AMAA does, however, expressly provide handlers with both administrative and judicial remedies. Handlers may challenge a market order by petition to the Secretary and are provided a formal adjudicatory hearing before an administrative law judge (7 U.S.C. § 608c(15)(A)), and, upon the Secretary's ruling, they may obtain prompt judicial review. 7 U.S.C. § 608c(15)(B). Moreover, 7

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[13] The facts in *Lehigh* are strikingly similar to those in the present case. There the challenged milk market order required handlers bringing in fresh fluid milk from outside the order area to pay the local producer settlement fund a compensatory payment equal to the difference between the higher rate for fresh fluid milk and the lower rate for certain milk products. In *Lehigh* this Court struck down that payment as a prohibition violative of 7 U.S.C. § 608c(5)(G) because it "taxed" the milk outside the order area so that it could not compete with the order area milk. In the instant case respondents have alleged that a similar compensatory payment scheme "limits" the marketing of a milk product, *i.e.*, reconstituted milk, in violation of 7 U.S.C. § 608c(5)(G). Complaint ¶¶ 26-29 and 41, J.A. at 16 and 19.

U.S.C. § 608c(14) protects a handler against the imposition of civil penalties during the pendency of the administrative proceeding, and the handler may disregard the order unless restrained to comply by injunction. 7 U.S.C. §§ 608a(6) and 608c(15)(B). The AMAA, however, does require handlers to exhaust the administrative remedies provided in 7 U.S.C. § 608c(15) before they may commence an action in district court to challenge the validity of a market order. *United States* v. *Ruzicka*, 329 U.S. 287 (1946).[14]

C. The Administrative Proceeding

On August 23, 1979, respondents and others filed a petition with the Secretary to eliminate the requirement in milk market orders that manufacturers of reconstituted milk make a compensatory payment to local dairy farmers. C.A. App. at 31.[15] The petition asserted that lower-cost reconstituted milk is unlawfully taxed by the market orders, which results in the unavailability of reconstituted milk to respondents. C.A. App. at 32, 34 and 40-42. The petition also asserted that these portions of the milk market orders (i) are not necessary to effectuate the purposes of the AMAA; (ii) are inconsistent with the policy objectives of 7 U.S.C. § 602; (iii) create trade barriers to milk products prohibited by 7 U.S.C.

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[14] *Ruzicka* was decided only two years after the Court had recognized that producers could obtain judicial review of the legality of market orders. *Stark* v. *Wickard*, 321 U.S. 288 (1944). *Ruzicka*, however, dealt "*solely* with the rights of handlers . . . [and] [a]s to *them* the procedural scheme is complete." *United States* v. *Ruzicka*, 329 U.S. 287, 295 (1946) (emphasis added).

[15] Respondents' petition was appended to their complaint as "Exhibit A." (References to "C.A. App." are to the Joint Appendix filed in the court of appeals).

§ 608c(5)(G); and (iv) exceed the statutory authority of the Secretary. C.A. App. at 43-50.

In their petition, respondents provided factual support for their allegations that handlers would manufacture reconstituted milk if the compensatory payment were eliminated, and that the elimination of the compensatory payment would benefit consumers through enhanced price stability and substantial cost-savings over fresh fluid milk.[16] Respondents also pointed to statistical data developed by the Secretary directly contradicting claims that pricing restrictions on reconstituted milk are necessary to protect fresh fluid milk from ruinous competition.[17]

In a November 16, 1979, Federal Register Notice, the Secretary invited comments on a series of questions

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[16] One study relied on by respondents concluded that elimination of the compensatory payment would result in an 18.8¢ per gallon savings to consumers who purchase reconstituted milk instead of fluid milk. See T. Roberts, *Federal Price Regulation of Close Substitutes for Fresh Drinking Milk: History, Economic Analysis, & Welfare Implications* (unpubl. dissertation, U. Wash. 1979), C.A. App. at 41 & n.10. Additional studies were also cited in the petition, which concluded that elimination of the tax on reconstituted milk would result in cost savings to consumers. See J. Hammond, B. Buxton, C. Thraen, *Potential Impacts of Reconstituted Milk on Regional Prices, Utilization and Production* (Agricultural Experiment Station, U. Minn. 1979), C.A. App. at 42 & n.12, 128 and 145; P. MacAvoy (ed.), *Federal Milk Marketing Orders & Price Support* (1976) citing Ippolito and Masson, *The Social Cost of Government Regulation of Milk* 111 (unpubl. paper, 1976), C.A. App. at 42 & n.13.

[17] Among the data cited was a 1977 survey by petitioner United States Department of Agriculture. The survey examined states not operating under the Federal market order system and concluded that the sale of reconstituted products in those states had not resulted in any noticeable adverse effect on dairy producers. C.A. App. at 43-45.

about the potential effects if respondents' petition were adopted. 44 Fed. Reg. 65989, 65990-91 (1979). In response, the Antitrust Division of the Department of Justice indicated that "[t]he lower costs that would result from deregulating reconstituted milk would enable consumers to enjoy lower priced [reconstituted milk] products." J.A. at 25. In addition, the comments of the Council on Wage and Price Stability stated that "[c]onsumers in the aggregate would save." J.A. at 41. Although there would be regional variations in both the degree of reconstituted milk's market penetration and the attendant cost-savings to consumers, it was apparent that there would be savings to consumers in virtually every region of the nation. J.A. at 24-26 and 31-33.

Moreover, the Antitrust Division's comments noted that adoption of respondents' proposal would rationalize national milk production by permitting surplus milk in more efficient production areas of the country to be marketed in less efficient areas, and would promote orderly marketing by stabilizing the price effects of seasonal variation in supply and demand. J.A. at 24-26. The Council on Wage and Price Stability, in its comments, also forecasted that the availability of reconstituted milk would result in increased market stability. J.A. at 34 and 40-41.

On November 17, 1980, the Secretary published a preliminary Impact Statement on the amendments proposed in respondents' petition and invited comment on it. 45 Fed. Reg. 75956 (1980) (the "Impact Statement"). The Impact Statement recognized that "[a]lthough the regulations apply to handlers, the primary impact of the reconstituted milk regulations also falls on the dairy producers and fluid milk consumers in the federal milk order areas." *Id.* at 75958. The Impact Statement also indicated

that removal of the compensatory payment required by the regulations would result, after three years, in substantial market penetration by reconstituted milk, an anticipated annual savings to consumers of about $186 million, and an annual savings to the government of about $165 million. *Id.* at 75971. On the other hand, the Impact Statement also anticipated a loss in cash farm receipts of about $520 million. *Id.*

On April 7, 1981, the Secretary denied respondents' petition. J.A. at 57-63. Even though he acknowledged that adoption of respondents' proposal would result in production of reconstituted milk and cost-savings to consumers, the Secretary determined that on balance the interests of dairy farmers outweighed the interests of consumers. J.A. at 57-63.

D. The Decisions Below

On December 2, 1980, after waiting more than fifteen months for the Secretary to rule on their petition, respondents filed this action in the United States District Court for the District of Columbia seeking judicial review under the APA of the Secretary's reconstituted milk regulations.[18] Specifically, respondents alleged that each is a consumer of fluid dairy products and that the regulations denied them an opportunity to purchase a "lower

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[18] Joining respondents in the action were The Community Nutrition Institute ("CNI"), a non-profit organization, and Joseph Oberweis, a milk handler. The district court's dismissal of CNI and Oberweis was affirmed by the court of appeals, and neither sought review in this Court. Respondents also sought judicial review of the Secretary's failure to act on their petition. Complaint ¶ 46, J.A. at 19. This claim became moot when the Secretary denied respondents' petition four months after the suit was filed. J.A. at 57-63.

priced reconstituted milk product in lieu of raw fluid milk." Complaint ¶¶ 7, 26-28, J.A. at 12, 16. Respondents also alleged that the challenged regulations deprive them of a stabilizing market influence. Complaint ¶ 31, J.A. at 17. Respondents further alleged that the regulations were invalid because:

(i) they are arbitrary, capricious, unsupported by substantial evidence, and unnecessary to effectuate the declared policy of the AMAA; and

(ii) they are in excess of the Secretary's authority in that (a) they create an economic barrier to the marketing of reconstituted milk products and their ingredients in contravention of 7 U.S.C. § 608c(5)(G); (b) they result in non-uniform prices among milk handlers based on use in violation of 7 U.S.C. § 608c(5); and (c) they are inconsistent with and obstruct the declared policy of the AMAA. Complaint ¶¶ 40-42 and 44, J.A. at 18-19. Without reaching the merits of respondents' claims, the district court (Gasch, J.) granted the Secretary's motion to dismiss on the grounds that respondents lacked standing. Pet. App. at 53a-67a.[19]

The court of appeals reversed the district court's order of dismissal of respondents. Judge Wilkey, joined by Judge Tamm, reviewed the regulatory scheme of the AMAA and the constitutional and prudential standing principles in great detail. Pet. App. at 1a-12a. The court of appeals held that respondents had sufficiently alleged injury in fact, causation and redressability, that respondents' interests were within the "zone of interests" of the AMAA, and that, while their injury may be shared by

[19] While cross-motions for summary judgment were also filed, the district court ruled only on the government's motion to dismiss. Pet. App. at 68a.

many, it was not a generalized grievance. Pet. App. at 13a-26a. The court of appeals also held that there was no basis upon which to conclude that Congress intended to preclude review by consumers. Pet. App. at 26a n.75.

Judge Scalia dissented, in part. Pet. App. at 35a-40a. He did *not* disagree with the majority's conclusion that respondents satisfied the requirements of Article III (injury in fact, causation and redressability). Rather, he claimed that respondents lacked standing because they were within a broad class of individuals who were indirect beneficiaries of the AMAA's restrictions. In so concluding, Judge Scalia placed particular reliance on his perception that respondents' interests were derivative of, and identical to, those of a narrower class of direct beneficiaries, *i.e.*, handlers, who clearly had a right to obtain judicial review.[20]

SUMMARY OF ARGUMENT

1. Respondents' standing is based on the injury that they have suffered and continue to suffer, caused by the regulations of the Secretary, which effectively prohibit the marketing of a lower-cost alternative to fresh fluid milk in the regions in which they reside. Further, the absence of reconstituted milk results in seasonal fluctuations in fresh fluid milk supply, which in turn raises fresh fluid milk prices to respondents. Respondents are "adversely affected" or "aggrieved" persons with standing to obtain judicial review of the Secretary's regulations pursuant to Section 10 of the APA, 5 U.S.C. § 702.

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[20] Judge Scalia's opinion appears to rest on the conclusion that consumer interests are not within the zone of interests of the AMAA. He did not conclude that consumers are precluded from seeking review under the APA.

The allegations of respondents satisfy the constitutional requirements for standing established by this Court. The respondents have been personally injured by their inability to purchase reconstituted milk, a lower-cost alternative to fresh fluid milk. This injury is fairly traceable to the compensatory payment and down allocation requirements contained in the milk market orders, which create insuperable economic barriers to the marketing of reconstituted milk. There is a substantial likelihood that removal of these requirements will result in lowering the cost of reconstituted milk and in its becoming available for purchase. The Secretary's own Impact Statement assumes that this relief will save all consumers, after three years, approximately $186 million annually. Therefore, the injuries alleged by respondents are likely to be redressed by the elimination of the challenged portions of the milk market orders.

Moreover, even though the injuries experienced by respondents may be shared by many, they are definable and discrete and therefore do not constitute a generalized grievance. *Schlesinger* v. *Reservists Committee*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974).

Finally, in satisfaction of the prudentially based zone of interests test, respondents have demonstrated that their interests are arguably within the zone of interests of the AMAA. *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150 (1970). Indeed, Congress in two of the four policy sections of the AMAA, Sections 2(2) and 2(4), acknowledged the interests of consumers. 7 U.S.C. §§ 602(2) and 602(4). The AMAA also prohibits the Secretary from issuing milk market orders that do not tend to effectuate these policy sections, which recognize the interests of consumers. 7 U.S.C. § 608c(4).

2. This challenge by respondents under the APA is not expressly precluded by the AMAA, and preclusion cannot be inferred. This Court has held that judicial review under the APA will be assumed, and preclusion inferred only upon a showing of "clear and convincing evidence of a contrary legislative intent." *Barlow* v. *Collins*, 397 U.S. 159, 167 (1970).

The government argues that since Congress granted explicit rights of administrative and judicial review only to handlers in the AMAA, Congress intended to preclude review for nonhandlers. This theory is without merit in light of the decisions of this Court in *Stark* v. *Wickard*, 321 U.S. 288 (1944), and its progeny, which recognize that producers have standing to obtain judicial review. While producers and consumers may not have equally intimate interests for purposes of standing, they are both nonhandlers. If producers are provided with the right of judicial review, there is no basis upon which to conclude Congress intended to preclude consumers from seeking judicial relief.

Moreover, there is nothing in the language of the AMAA or the legislative history that even tends to establish any intent of Congress to preclude judicial review by consumers. Absent such a demonstration, the government has not sustained its heavy burden to show that consumers are precluded from seeking judicial review under the APA.

ARGUMENT

I. RESPONDENTS HAVE STANDING

This Court has identified three elements of constitutional standing which any plaintiff must satisfy:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show [1]

> that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. *Americans United*, 454 U.S. 464, 472 (1982) (citations omitted). In addition, this Court has established certain prudential requirements, including a determination of whether plaintiffs assert an interest that falls "arguably within the zone of interests" of the statute in question. *Association of Data Processing Service Orgs.*, 397 U.S. at 153. The district court is required, for purposes of standing, to "accept as true all material allegations of the complaint and . . . [to] construe the complaint in favor of the complaining party." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 109 (1979), quoting *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). Plaintiffs' allegations, as substantiated by them,[21] establish the requisite showing.

A. Respondents Have Been Injured In Fact

In order to demonstrate injury in fact, a plaintiff must allege that he has been injured personally. *Warth* v. *Seldin*, 422 U.S. at 499; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977). This injury need not be substantial; it will suffice for a plaintiff to demonstrate "an identifiable trifle." *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973).[22]

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[21] Respondents supplemented their allegations with affidavits and other evidence. See, e.g., Pet. App. at 16a n.44 and 59a-60a.

[22] For cases under Section 10 of the APA, " '[i]njury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in

Respondents Harrell, Desmarais and Weinberg are cost-conscious consumers of fresh fluid milk who reside in Florida, Arkansas and Texas, respectively. They seek to save money on food without sacrificing taste or the nutritional value of their diet. Complaint ¶ 7, J.A. at 12. They brought this action against the Secretary under Section 10 of the APA, 5 U.S.C. § 702, alleging that the challenged regulations violate the AMAA and deprive them of a lower-priced alternative to fresh milk that they would purchase if available. Complaint ¶¶ 7, 26-28, 40-42 and 44, J.A. at 12, 16 and 18-19. Further, they allege that the absence of commercially manufactured reconstituted milk results in seasonal fluctuations in fresh fluid milk supply which results in higher prices to them for fresh fluid milk. Complaint ¶ 31, J.A. at 17.

As the court of appeals noted: "There is no dispute over the adequacy of the connection between the alleged injury and Consumers." Pet. App. at 14a n.39. The loss alleged is personal to respondents and not that of any third party. It is also uncontested that reconstituted milk is not available in the regions in which respondents reside. The existence of such a barrier is sufficient to establish the requisite injury in fact. *Village of Arlington Heights*, 429 U.S. at 261.

Moreover, the Secretary's own Impact Statement substantiates respondents' allegations. 45 Fed. Reg. 75956 (1980). According to that Impact Statement, if the compensatory payment were eliminated, within three years consumers would save $186 million annually in fluid milk expenditures. *Id.* at 75971. See also J.A. at 61. This

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the outcome of a litigation—even though small—from a person with a mere interest in the problem." *United States* v. *SCRAP*, 412 U.S. at 689 n.14.

impact assessment confirmed the conclusions of both the Antitrust Division of the Department of Justice and the Council on Wage and Price Stability, whose comments had been submitted to the Secretary (J.A. at 21-27 and 28-41), and was bolstered by affidavits submitted by respondents. J.A. at 64-68 and 74-81. Not only does this demonstrate the benefit to consumers if the relief sought is granted, but it also demonstrates the loss or injury suffered as a direct result of the challenged regulations.

In dismissing respondents' complaint, however, the district court relied upon the government's assertion that in addition to the $186 million savings to consumers each year after three years, the changes sought by respondents would cost producers $576 million,[23] which might in turn produce " 'a radical change in the Dairy industry' . . . [which] *might* interfere with the public's access to an adequate supply of milk and might result in higher prices for milk products, including milk powder." Pet. App. at 60a (emphasis in original).[24] The district court's

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[23] It should be noted, however, that the Secretary's projection of $186 million in savings to consumers contains a corresponding projection of a $520 million loss to producers. 45 Fed. Reg. 75956, 75971 (1980). The loss to producers of $576 million cited by the district court would occur, according to the Secretary if, in addition to granting respondents' petition, the Secretary also made a complementary change in other milk regulations. In such a case, the savings to consumers would be $399 million, with an additional $230 million savings to the government. *Id.* at 75973.

[24] The district court did not reject the findings of the Impact Statement as being overly speculative. It simply went beyond the analysis to indicate that in the end, consumers "might" be no better off because of the loss to producers. This, however, does not negate or lessen the finding of injury upon which to base a determination of standing. In any event, the Secretary's conclusions concerning an overall effect were contradicted by the comments of the Antitrust

acknowledgement of the potential gain to consumers if reconstituted milk were available, combined with the uncontroverted fact that reconstituted milk is unavailable to respondents, who desire to purchase it, demonstrate the requisite definable, discrete and specific injury.

In characterizing respondents' allegations as "speculative and hypothetical," the government fails to respond to the unavailability of reconstituted milk as a lower-cost alternative to fresh fluid milk. Pet. Br. at 44. Moreover, it also fails to respond to respondents' allegation that "[t]ight fluid markets and rising fluid prices could be avoided and the size of the reserve fresh whole Grade A milk needed to provide the fluid market could be reduced if such adjustments were possible" (Complaint ¶ 31, J.A. at 17), or to the data submitted by respondents to support those allegations. Rather, the government focuses exclusively on the injury suffered from seasonal shortages. Pet. Br. at 44. However, it is the economic injury resulting from price increases attendant to seasonal fluctuations that respondents are alleging as their injury and not the seasonal shortages themselves.

B. The Injury Can Fairly Be Traced To The Secretary's Regulations And Is Likely To Be Redressed By The Relief Sought

In addition to demonstrating injury in fact, a plaintiff must establish that the injury "fairly can be traced to the challenged action." *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 472 (1982), quoting

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Division (J.A. at 24-26), the Council on Wage and Price Stability (J.A. at 33-34), and studies cited by respondents in their petition (see n.16 at 11, *supra*), which indicated that consumers and the national dairy system would benefit from the relief sought.

Simon v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976). That requirement is met here because the challenged regulations stand as the only complete barrier to the marketing of reconstituted milk at lower prices in the regions where the respondents reside.

Respondents need only make a reasonable showing that "but for" defendant's action, the alleged injury would not have occurred. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-75 (1978). Thus, respondents allege that when the compensatory payment is added to the other costs incurred by a handler in producing reconstituted milk, the resulting price makes it unable to compete with fresh fluid milk. Complaint ¶ 26, J.A. at 16. According to the Secretary's own statements, "[w]ith no change in the pricing of reconstituted milk, handlers in most areas would continue to have strong disincentives to use reconstituted milk rather than fresh fluid milk in processing fluid milk products." 45 Fed. Reg. 75956, 75965 (1980). Therefore, it is reasonable to conclude, as did the court of appeals, that "if handlers were not required to make a compensatory payment they would pass the savings on to consumers . . ." Pet. App. at 16a. [25]

Closely related to causation is the final Article III standing requirement that the injury alleged "is likely to be redressed by a favorable decision."[26] The favorable

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[25] Indeed, the Secretary's Impact Statement cited examples where consumers did benefit from such pass-throughs. See 45 Fed. Reg. 75956, 75960 (1980).

[26] *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 472, quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). See also *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 262 (1977).

decision being sought in this action is the elimination of the compensatory payment and down allocation requirements that effectively prohibit the marketing of reconstituted milk. Since it is economically infeasible to market reconstituted milk with the addition of a compensatory payment, it is "likely" that the removal of these barriers will result in the availability of reconstituted milk to the respondents.

The elimination of these regulations almost certainly would result in the sale of reconstituted milk at lower prices. The Secretary has indicated that if the regulations are not amended as respondents have requested, there would be no economic incentive for handlers to make reconstituted milk available to consumers. 45 Fed. Reg. at 75965. The Secretary's views reflect those of the Antitrust Division of the Department of Justice. In its comments on the Secretary's Impact Statement, the Antitrust Division stated: "If local handlers could economically turn to reconstituted milk they would substantially undermine the potential market power of local producers and limit their ability to extract premium prices." See Supplemental Affidavit of Thomas B. Smith ¶ 14, J.A. at 80-81, quoting Comments of the Antitrust Division, Dep't of Justice 6 (Feb. 12, 1981).

The district court stated, as the government now does, that there are many variables that may affect consumer prices if the regulations were changed. Pet. Br. at 47. While this may be so, it is, however, undeniable that the market *cannot* operate under the current regulations to provide respondents access to reconstituted milk. The grant of the relief sought will "at least create a substantial probability" that reconstituted milk will be marketed and fresh fluid prices will be stabilized. See *Village of Arlington Heights* v. *Metropolitan Housing Development*

Corp., 429 U.S. 252, 264 (1977), quoting *Warth* v. *Seldin*, 422 U.S. 490, 504 (1975). See also *Duke Power Co.*, 438 U.S. at 81.

Respondents' claim does not suffer the deficiencies found in *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), one of the cases primarily relied upon by the government. The low income taxpayer plaintiffs in *Simon* were denied standing because, even if their requested remedy was granted, "it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services." *Id.* at 43. In the present case, the government has been unable to suggest any plausible reasons why the requested relief will not flow from the removal of the Secretary's regulatory barrier. In contrast, respondents have demonstrated with factual evidence, consistent with the Secretary's own Impact Statement, that the relief sought is likely to occur if the current barriers are removed.

The court of appeals correctly rejected the government's speculation that the elimination of the challenged regulations would not result in the marketing of reconstituted milk. Pet. App. at 16a-18a. Rather, the court accepted the Impact Statement, which established that the elimination of the challenged regulations would probably result in the availability of reconstituted milk and more stable prices for fresh fluid milk. *Id.*

Petitioners now claim, however, that their own Impact Statement should be ignored since it "analyzed the impact on the producer-through-consumer chain as if all independent, intervening variables would operate to the benefit of consumers." Pet. Br. at 48. The Impact Statement was developed and written by the Secretary. The Secretary

should not be able to disavow it now. It contains precisely the facts upon which the current Secretary based his decision rejecting respondents' petition for rulemaking on April 7, 1981. J.A. at 57-63.[27] Further, respondents have submitted independent testimony supporting the analysis of the Impact Statement, e.g., Affidavits of Thomas B. Smith, J.A. at 64-68 and 76-81; and rely on the Secretary's own empirical evidence showing that "handlers in non-regulated areas have manufactured and marketed lower-priced reconstituted milk." Pet. App. at 17a, citing 45 Fed. Reg. 75956, 75971 (1980).

In assessing petitioners' own statements, as well as the independent evidence submitted by respondents, it is important to recognize that the issue before the Court is solely the threshold question of standing, not the correctness of any determination of the ultimate impact of the changes that respondents seek. This important distinction, which the government glosses over, was recognized by the court of appeals when it rejected the district court's conclusions as to redressability:

> As the Supreme Court has observed, a plaintiff is not required to negate every "speculative and hypothetical possibilit[y] . . . in order to demonstrate the likely effectiveness of judicial relief."[32] Requiring Consumers to show more than they did in this case forces them to prove their case in order to acquire standing. This is not what the Constitution requires. The redressability element of Art. III is designed to bar disputes which will not be resolved by judicial

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[27] Indeed, the Secretary stated:

> [T]he impact statement [though based on the 1978 data] nevertheless is useful in portraying the general impacts that might be expected.

J.A. at 60.

action. It does not prevent a court from hearing a case which may ultimately be unsuccessful.

[32] *Duke Power*, 438 U.S. at 78.

Pet. App. at 18a-19a.

Respondents have alleged an injury that is substantiated by the Secretary's own Impact Statement. It is not contested that at least one of the injuries experienced by the respondents, *i.e.*, the unavailability of reconstituted milk, is the direct result of the Secretary's regulations. Finally, there is a "substantial probability" that if the regulations are eliminated, reconstituted milk will become available for purchase by the respondents. Accordingly, the requirements of causation and redressability have been satisfied here.

C. The Respondents' Claims Are Not A Generalized Grievance

The government also asserts that the respondents' claim is a generalized greivance, *i.e.*, a grievance where injury in fact has been established, but where the injury is shared by many others. This Court has used the "generalized grievance" test as the basis for dismissal only where no injury in fact has been demonstrated. See *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 489 (1982); *Schlesinger* v. *Reservists Committee*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974). In those cases, plaintiffs asserted only the interests of taxpayers and citizens generally shared by many and were unable to demonstrate any particularized injury to themselves other than the general effect on the Federal budget and their interests as citizens. In this case, however, respondents have shown the inability to buy a particular product in lieu of the higher priced fresh fluid milk. These injuries are no less specific to them

because they may be shared by many others.[28] As the court of appeals aptly stated:

> Consumers' injury is a generalized grievance only in the sense that it is shared by many other persons, *i.e.*, every other cost-conscious consumer of milk. It may be argued that the widespread nature of the injury requires us to dismiss the claim as a generalized grievance. However, we refuse to believe that the mere fact that a plaintiff's injury is shared by many people requires a court to dismiss his complaint. If dismissal were required in such cases, consumer injuries would never be justiciable because "[c]onsumer injuries, by their very nature tend to be shared in common by many other similarly situated individuals."

Pet. App. at 25a (footnote omitted). This is consistent with this Court's prior decisions interpreting standing under Section 10 of the APA, 5 U.S.C. § 702, that "standing is not to be denied simply because many people suffer the same injury." *United States* v. *SCRAP*, 412 U.S. at 687. See *Sierra Club* v. *Morton*, 405 U.S. 727, 734-38 (1972).

The government, in support of its generalized grievance argument, suggests that to grant standing to respondents would be to grant standing to persons with indirect interests. Pet. Br. at 46.[29] Respondents' interests are not generalized, indirect or derivative of interests better brought to the attention of the courts by others.

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[28] Indeed, given the regional variation in the effects of the regulations at issue, consumers are not affected equally. As shown above, even the three respondents are affected in different degrees. See, e.g., pp. 5-6, *supra*.

[29] The government also suggests that since respondents' claim is generalized, it is more appropriately addressed by Congress, an issue addressed at pp. 35-36, *infra*.

Respondents, as ultimate consumers of products marketed by handlers, cannot be assumed to be protected by handlers. In this case the interests of handlers do not coincide with the interests of respondents. The government has speculated that handlers *may* not reduce prices or even market reconstituted milk if the relief sought by respondents is granted. Pet. Br. at 47. It is, therefore, anomalous for the government at the same time to argue that handlers fully represent the interests of respondents. Pet. Br. at 45. Respondents have an interest that is not otherwise represented, and there is no basis upon which to deny them an opportunity to obtain judicial review of the Secretary's regulations.

Even assuming *arguendo* that handlers' interests are similar to those of consumers, the government's argument still fails. Many interests asserted by one group of individuals also can be asserted by others. The holding requested by the government would create an additional test in APA cases not previously recognized by this Court. The government suggests that not only must a person suffer a redressable injury, but he must not represent interests that are otherwise represented. This theory would greatly restrict standing beyond the requirements established by this Court in *Barlow* v. *Collins*, 397 U.S. 159 (1970), and would be particularly inappropriate in cases, such as this one, brought under the APA.

D. Respondents Satisfy The Zone Of Interests Test

In addition to satisfying the constitutionally required elements of standing, respondents also must demonstrate that they satisfy the prudential elements of standing established by this Court. The government questions whether respondents' interests are "arguably within the zone of interests to be protected or regulated by the

statute . . . in question." *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970).

The zone of interests test was developed in cases, such as this one, reviewing decisions of administrative agencies, as an alternative to the more restrictive requirement that plaintiffs demonstrate a legal interest in order to obtain standing:

> The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

Id. at 153. This test emanated from Section 10 of the APA, which gives standing to a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

The court of appeals followed the analysis developed in its prior decision in *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978), in holding that respondents were arguably within the zone of interests included in Sections 2(2) and 2(4) of the AMAA, 7 U.S.C. §§ 602(2) and 602(4), to challenge the Secretary's actions. The court of appeals noted that under the zone of interests test, "a plaintiff was only required to assert an interest 'which *is arguable from the face of the statute*.' Consumers have clearly done this much." Pet. App. at 22a, quoting *Tax Analysts* at 142 (emphasis in original) (footnote omitted). Since 7 U.S.C. § 608c(4) requires the Secretary to find, prior to issuing a milk market order, that the order "will tend to effectuate the declared policy of this chapter," the court of appeals properly looked to the policy of the AMAA to identify the proper zone of interests:

> The declared policies of the AMAA are contained in section 602. Section 602(4) clearly expresses the policy that the Secretary use "the powers conferred . . . under this chapter . . . as will provide in the interests of producers *and consumers*, an orderly supply [of milk] . . . *to avoid unreasonable fluctuations in supplies and prices*." Since Consumers allege that the challenged portion of the milk market orders prohibits the sale of reconstituted milk, resulting in higher milk prices and seasonal shortages, they [respondents] have asserted an interest which is at least "arguably" within the zone of protected interests.

Pet. App. at 22a-23a (emphasis in original) (footnotes omitted).

Congress did not give the Secretary of Agriculture a free rein to take any action which might be in the interest of producers. To the contrary, "the text and legislative history of this statute make it plain that the Secretary was required to operate within the narrow confines of powers expressly granted." *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762, 766 (D.C. Cir. 1971).

In enacting the AMAA, Congress sought to provide dairy farmers a fair return on their investment which is adequate to assure a stable supply of milk. At the same time, 7 U.S.C. § 602(2) reflects congressional concern that consumers not bear the burden of any regulation that maintains producer prices higher than necessary to accomplish this purpose. By asserting that the existing milk market orders are unnecessary to protect farmers and that the regulations unfairly harm consumers, respondents bring themselves squarely within the zone of interests protected by the statute. See *Schepps Dairy* v. *Berglund*, 628 F.2d 11, 19 (D.C. Cir. 1979) (one of the principal statutory policies of the AMAA is "to protect the health and purses of consumers").

The government nonetheless contends that the court of appeals erred by relying on "isolated statutory references to consumers" and by "eschew[ing] any resort to the legislative history to elucidate the statute's meaning." Pet. Br. at 34-35. Neither is correct. Judge Wilkey, in applying the test refined in *Tax Analysts*, simply held "that a plaintiff was only required to assert an interest 'which is *arguable from the face of the statute.*'" Pet. App. at 22a, quoting *Tax Analysts*, 566 F.2d at 142.[30] The court of appeals did not "chastise[]" the district court for the use of legislative history (Pet. Br. at 11), "refuse[] even to consider it" (Pet. Br. at 15), "disregard[]" the legislative history (Pet. Br. at 36) or "avert its gaze from the legislative history" (Pet. Br. at 37). The court of appeals did not ignore the legislative history; it simply refused to use inconclusive history to contradict interests "arguable from the face of a statute."[31]

Moreover, in this case, legislative analysis does not support the petitioners' position. The government questions the court of appeals' reliance upon Section 2(2) of the AMAA because the section speaks of consumers only in the context of parity pricing, and parity pricing is antithetical to respondents' interest in a lower-cost alternative to fresh fluid milk and stable prices. Pet. Br. at 35. This

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[30] Moreover, the court in *Tax Analysts* recognized that the specific interest to be regulated may not have been considered in the legislative history. 566 F.2d at 142. Thus, here, the technology for reconstituted milk did not exist in the 1930's, and hence, there could not have been any references to lower-cost alternatives to fresh fluid milk, because none existed in commercially usable form.

[31] Pet. App. at 22a. The court of appeals did specifically consider the district court's rejection of Section 2(4)'s "identity of purpose" with 7 U.S.C. § 608c(4) on the basis that it was added in 1954. Pet. App. at 21a.

conclusion is an unreasonably narrow reading of the interests encompassed by Section 2(2). The legislative history relied upon by the government establishes the respondents' interests within the statute. Congress has explained that "[i]n the long run, consumers cannot expect to buy any product at a price which represents less than a fair return to the labor and capital involved in producing the commodity." Pet. Br. at 38, quoting H.R. Rep. 6, 73d Cong., 1st Sess. 7 (1933). Congress went on to conclude: "The consumer as well as the farmer and the businessman have everything to gain from a fair and balanced relationship between production and consumption . . ." *Id.*

Respondents do not, in this case, challenge the legality of the minimum price established by the Secretary for fresh fluid milk, and respondents do not have to demonstrate that the statute creates a legal right to lower prices.[22] At most they have to demonstrate an interest in "a fair and balanced" relationship reflected in Section 2(2) of the AMAA. A reasonable reading of Section 2(2) is that it expresses a general policy that consumers should not pay unreasonably high prices for milk or milk products as a result of the price fixing authority conferred by the AMAA. Certainly respondents assert interests that are arguably within the zone of interests encompassed by Section 2(2) and the legislative history.

The government also seeks to reject respondents' interests under Section 2(4), because that section was not

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[22] As the court of appeals noted, the zone of interests test does not require "that there be affirmative evidence that the Congress intended that a plaintiff situated precisely as the plaintiff then standing before the court be regulated or protected." Pet. App. at 23a n.66, quoting *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 142 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

part of the original AMAA, having been added when Congress enacted the Agricultural Act of 1954, ch. 1041, 68 Stat. 906. The government relies on the district court's reasoning that Section 2(4) "dealt primarily with the price supports and parity pricing" and because "[n]owhere in the House Report is the interest of consumers mentioned in relation to Orders regulating commodities." Pet. App. at 62a-63a.[33]

The district court found no mention of Section 2(4) in the House Report, not because the section was not intended to protect the interest of consumers with respect to market orders, but because the provision was added by the Senate. The Senate committee report leaves no doubt that this provision was added because of problems of unreasonable fluctuations in supplies and prices when there was a discontinuity in the operation of marketing agreements and orders. S. Rep. No. 1810, 83d Cong., 2d Sess. 8 (1954). Respondents have a clear interest in such market stability.

The government also argues that respondents are not within the "zone of interests" of the AMAA because their interest in a lower-cost alternative to fresh milk is directly antithetical to the interests of producers, the primary beneficiaries of the AMAA. Pet. Br. at 2.[34] They further

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[33] The legislative history cited by the district court explains the price support and parity price amendments made by the 1954 Act to the Agricultural Act of 1949 and the Agricultural Adjustment Act of 1938. These sections of the legislative history do not purport to explain the amendments made by the 1954 Act to the AMAA.

[34] The zone of interests test may be more restrictive in non-APA cases like *Valley Forge* where the word "arguably" has recently been omitted from the test. However, it is assumed that "arguably" is still part of the test in APA cases. See Pet. App. 35a-36a (Scalia, J., dissenting).

argue that consumers' interests are derivative of, and "virtually identical" to, those of handlers. Pet. Br. at 29. Therefore, the government suggests that to provide judicial review to respondents would permit the assertion of interests contrary to those of the primary beneficiaries, the producers, and would unnecessarily duplicate the interests asserted by those regulated by the AMAA, the handlers.

The case law does not support the government's attempted categorization of these interests. In many prior decisions, including those of this Court, producers and handlers have aligned themselves in virtually every conceivable combination: producers against producers, handlers against handlers, and handlers and producers together. Indeed, these interests have been aligned for and against the Secretary's market orders. See, e.g., *H.P. Hood & Sons* v. *Whiting Milk Co.*, 307 U.S. 588 (1939) (two producers intervened as defendants in support of the position of the three handler-defendants in an enforcement action brought by the Secretary); *United States* v. *Rock Royal Co-op*, 307 U.S. 533 (1939) (defendants in an enforcement action brought by the Secretary included a proprietary handler and three cooperatives; a cooperative intervened on behalf of the Secretary to defend the market order); *Jones* v. *Bergland*, 440 F. Supp. 485 (E.D. Pa. 1977) (two producers, a federation of cooperative associations and five of the federation's members sought to enjoin a milk market order); *Cranston* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y. 1968), rev'd and remanded, 428 F.2d 822 (2d Cir. 1970), cert. denied, 401 U.S. 949 (1971) (a class of 250 producers challenged a milk market order; a class of 3000 producers intervened as defendants in support of the order). It is, therefore, not instructive to seek to rigidly align potential parties and the interests to be protected by the statute.

Even assuming that respondents' interests are necessarily antithetical to those of the primary beneficiaries, the producers, it does not follow that consumers fall outside the zone of interests of the statute. The decisions of this Court applying the zone of interests test have recognized the standing of parties whose interests were directly opposed to the interests of the primary beneficiary of the relevant statute. In *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), this Court allowed travel agents to challenge a ruling under the Bank Services Corporation Act, permitting banks to offer travel services to their customers. The Court found that travel agents arguably fall within the zone of interests of the statute even though, as the court of appeals noted, nothing in the statute mentions such an interest, and the legislative history evinces only concern on Congress' part of insuring the stability, liquidity, and safety of banks. *Arnold Tours, Inc.* v. *Camp*, 408 F.2d 1147, 1150-51 (1st Cir. 1969), aff'd, 400 U.S. 45 (1970). Similarly, in *Association of Data Processing Service Orgs.* v. *Camp*, 397 U.S. 150 (1970), companies specializing in data processing were allowed to challenge an administrative order permitting banks to sell computing services to other banks pursuant to a statute concerned only with the well-being of banks.[35]

Finally, the government suggests the "respondents have a remedy, but it lies with Congress rather than with the courts." Pet. Br. at 41. Respondents are not challenging the AMAA; they are challenging regulations issued pursuant to the Secretary's incidental rulemaking au-

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[35] The courts have expressly rejected the argument that only the primary beneficiary of a statutory scheme may obtain judicial review of agency decisions. See, e.g., *Rental Housing Ass'n* v. *Hills*, 548 F.2d 388 (1st Cir. 1977).

thority some 30 years after the enactment of the AMAA. Respondents are claiming that the Secretary has violated the terms of the AMAA by creating economic barriers to the marketing of reconstituted milk, and by issuing regulations that both encourage price increases in times of seasonal shortages and preclude the stabilizing effect reconstituted milk would have. This stabilizing effect would result if the regulations did not, in effect, prohibit milk powder from being used to supplement the fresh fluid milk supplies in less efficient milk producing regions. Congress has already spoken on this issue, and respondents are simply asking the courts to enforce the law Congress has already enacted.

II. THE AMAA DOES NOT PRECLUDE CONSUMERS FROM SEEKING JUDICIAL REVIEW OF MILK MARKET ORDERS

A. Preclusion Of Review Is Not Mandated By The Statute

The government argues that even if respondents satisfy the requirements for standing, they are nonetheless precluded from bringing this action because there are legal remedies available to others and Congress intended, by establishing such remedies, to ban consumer challenges. There are a number of reasons why that position is in error. The most important is the very limited scope of preclusion under the APA. Section 10 of the APA provides judicial review to "[a] person . . . adversely affected or aggrieved by agency action within the meaning of the relevant statute . . ." (5 U.S.C. § 702), except to the extent that "statutes preclude judicial review." 5 U.S.C. § 701(a).

It is well established that except where preclusion is explicit on the face of the statute, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such

was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). This Court has further established that "[a] clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose. . . . It is, however, 'only upon a showing of "clear and convincing evidence" of a *contrary* legislative intent' that the courts should restrict access to judicial review." *Barlow* v. *Collins*, 397 U.S. 159, 167 (1970), quoting *Abbott Labs*, 387 U.S. at 141 (citation omitted) (emphasis added). Moreover, the party asserting nonreviewability has the heavy burden of overcoming the strong presumption in favor of review. *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). See *Abbott Labs*, 387 U.S. at 141; *Morris* v. *Gressette*, 432 U.S. 491, 500-01 (1977).

The government does not and cannot claim that the AMAA explicitly precludes judicial review. Rather, the government asserts that consumers are precluded from seeking judicial review since Congress did not provide them with the explicit right of review granted to handlers under 7 U.S.C. § 608c(15). The principal difficulty with this position is that there is nothing in the AMAA which grants producers the right to seek judicial review. Yet this Court in *Stark* v. *Wickard*, 321 U.S. 288, 309 (1944), recognized the standing of producers to challenge milk market orders.[36]

The government has suggested in various ways that producer standing to challenge milk market orders is limited to their "proprietary interest." Compare Pet. at

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[36] Indeed, in *Abbott Labs*, this Court cited *Stark* v. *Wickard* as an example of an early case recognizing the availability of judicial review in the absence of a persuasive reason to believe Congress intended otherwise. 387 U.S. at 140.

20 with Pet. Br. at 30 n.17. The cases are not so limited. Producers may challenge the legality of any order as long as they can meet the three-part test established by the Court in *Barlow* and *Association of Data Processing Service Orgs.* Notwithstanding the Secretary's attempts to limit *Stark* v. *Wickard* to its facts, the overwhelming case law recognizes the right of producers to challenge any aspect of milk market orders that affects them adversely. See, e.g., *Suntex Dairy* v. *Bergland*, 591 F.2d 1063, 1065-66 (5th Cir. 1979); *Consolidated-Tomoka Land Co.* v. *Butz*, 498 F.2d 1208 (5th Cir. 1974) (challenge to procedure utilized in producer referendum). Moreover, the courts have recognized the right of other entities (neither regulated handlers nor producers), including importers and unregulated processors of commodities, to obtain judicial review of market orders.[37]

Rasmussen v. *Hardin*, 461 F.2d 595 (9th Cir.), cert. denied, 409 U.S. 933 (1972), the case primarily relied upon by the government to justify preclusion, was wrongly decided and has not been followed by the Ninth Circuit or in the holdings of other courts. Since *Rasmussen*, the Ninth Circuit has held, regarding other statutes, that "judicial review will not be cut off unless clear and convincing evidence discloses that Congress had both considered and prohibited judicial review of the agency action in question." *Kitchens* v. *Department of Treasury*, 535 F.2d 1197, 1199 (9th Cir. 1976). See *County of Alameda* v. *Weinberger*, 520 F.2d 344, 348 (9th Cir. 1975)

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[37] See *Harry H. Price & Sons, Inc.* v. *Hardin*, 425 F.2d 1137, 1140 (5th Cir. 1970), cert. denied, 400 U.S. 1009 (1971) (unregulated handler of tomatoes has standing to challenge marketing orders and regulations although it is only "indirectly affected"); *Walter Holm & Co.* v. *Hardin*, 449 F.2d 1009 (D.C. Cir. 1971) (tomato importer).

(HEW had the burden of demonstrating that review was prohibited).[38]

The court of appeals in this case examined *Rasmussen* and concluded that preclusion of judicial review for consumers should not be inferred where Congress provided review procedures only for handlers, for "this does not constitute the type of clear and convincing evidence of congressional intent needed to overcome the presumption in favor of judicial review, . . . especially since no legislative history or statutory language is cited." Pet. App. at 26a n.75.[39]

In *Rasmussen*, the Ninth Circuit distinguished *Stark* v. *Wickard* on the grounds that notwithstanding this preclusion theory, a producer had standing to "sue when he was claiming that moneys belonging to him were being improperly diverted to others." 461 F.2d at 600.[40] The government contends that the more direct interest of producers distinguishes them from consumers for pur-

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[38] Dicta in *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (5th Cir. 1979), suggests that the decision in that case extending standing to producers does not extend to consumers. That decision does not support a preclusion argument because in *Suntex Dairy* the court did not have before it the issue of consumer standing, and itself rejected *Rasmussen's* reasoning that nonhandlers were precluded from seeking judicial review. *Id.* at 1066-67.

[39] It is important to note that the dissent of Judge Scalia, relied upon heavily by the government, did not even mention the preclusion argument. Instead, Judge Scalia's one reference to *Rasmussen* was in the context of a discussion of the weight to be given the policy of Section 2(2) of the AMAA as establishing interests of consumers. Pet. App. at 40a.

[40] In *Rasmussen*, the court stated that all producer standing cases are limited to fact situations identical to *Stark* v. *Wickard*. This, of course, is no longer true. See p. 38, *supra*.

poses of preclusion. However, a strong interest of producers does not itself overcome preclusion if preclusion was the clear and convincing intent of Congress. Often persons with strong interests in the outcome may be precluded from review. See *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act*, 1976 Duke L.J., 431, 432. It is, therefore, not persuasive that producers may in some cases have more intimate interests than consumers or that consumers' interests may be antithetical to the interests of producers.

In addition, there is evidence in the legislative history of the AMAA to demonstrate that it was the intent of Congress to protect consumers. See pp. 31-33, *supra*. Neither the Ninth Circuit in *Rasmussen* nor the government here has presented any legislative history that even suggests a congressional intent to preclude all nonhandlers generally, or consumers in particular, from seeking judicial review. The only legislative history directly cited by the government deals with the need to provide handlers, the primary target of potential enforcement, with "*equitable and expeditious procedures*" to challenge regulations applicable to them. Pet. Br. at 20 (emphasis in Pet. Br.). This does not demonstrate an intent to preclude consumers or anyone else from judicial review. Rather, it simply evinces an intent by Congress to provide a specific course of review for handlers. In providing "equitable and expeditious" review procedures for handlers, Congress nowhere stated or even implied that this meant that others should not be able to seek review.

Producers and consumers do not necessarily stand on the same or equal ground for purposes of seeking judicial review of the AMAA under the constitutional and

prudential elements of the law of standing. They do, however, share one common feature: they both are nonhandlers. Therefore, under the theory of preclusion advanced by the government, if consumers are precluded, producers also must be precluded, which is clearly contrary to the holding of this Court in *Stark* v. *Wickard*.[41] Moreover, even where a statute provides no cause of action, either explicitly or implicitly, review of agency action is generally available under Section 10 of the APA, 5 U.S.C. § 702. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317-18 (1979); *Sierra Club* v. *Peterson*, 705 F.2d 1475 (9th Cir. 1983).

In non-APA cases, the analysis has varied. In antitrust cases, this Court has established that foreseeable beneficiaries of competition have standing to enforce the antitrust laws, even though the laws were primarily designed to protect competitors. *Blue Shield* v. *McCready*, 457 U.S. 465 (1982). See also *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339-41 (1979) (retail consumers as a class had standing where they suffered injury to their "business or

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[41] The courts have held that preclusion requires more than a showing that the statute in question authorizes review by one group but is silent with respect to another. For example, in *Peoples* v. *United States Dept. of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970), plaintiffs, identified as "poor people," sought to challenge the manner in which the Secretary of Agriculture was administering Alabama's food stamp program. The Secretary argued that the plaintiffs were inferentially precluded from judicial review since the food stamp statute provided judicial review only to certain types of food distributors. The D.C. Circuit rejected the argument, noting that "[t]here is no fair implication that granting this special judicial review to food distributors was intended to curtail or negative the judicial review otherwise presumed to be available for the protection of the poor." *Id.* at 565.

property" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15).

The government ignores such cases and, instead, relies primarily on cases where this Court has held that no cause of action was intended to be created. These cases are inapposite in that they deal with the maintenance of private causes of action and do not deal with the issue of standing under Section 10 of the APA, 5 U.S.C. § 702.[42]

This case presents a wholly different context for analysis. In cases brought under the APA, review is presumed unless there is clear and convincing evidence to the contrary. *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). This is far different than determining if a cause of action is created between private parties or at a particular moment in the administrative process.

B. Policy Considerations Do Not Justify Preclusion

Finally, the government, based upon its own reading of the legislative scheme, asserts that "[s]ound policy reasons support the conclusion that Congress intended the statutory scheme for administrative and judicial review to be exclusive." Pet. Br. at 20. As part of its

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[42] This Court in *Nat'l R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 456 (1974), held that a cause of action did not exist; thus, it did not reach the issue of standing. Similarly, in *Associated General Contractors* v. *Cal. State Council of Carpenters*, 103 S. Ct. 897, 911 (1983), this Court held that a union, since its harm was remote, could not maintain a damage action under the antitrust laws. A cause of action would exist if the injury was direct and non-speculative. In the one APA case cited by the government, this Court read the Voting Rights Act as precluding review by *any* person at a particular phase of the administrative process. *Morris* v. *Gressette*, 432 U.S. 491 (1977). In *Morris*, the issue was one of reviewability and not preclusion of a particular party.

justification, the government contends that the maintenance of the billion dollar per month dairy program, which rests on a delicate balance between the interests of handlers and producers, should be insulated from consumer initiated court review, which would upset that carefully established balance. Pet. Br. at 22-23.[43]

This Court faced similar arguments when it extended standing to producers to challenge the market orders.

> It is suggested that such a ruling puts the agency at the mercy of objectors, since any provisions of the Order may be attacked as unauthorized by each producer. To this objection there are adequate answers. The terms of the Order are largely matters of administrative discretion as to which there is no justiciable right or are clearly unauthorized by a valid act. United States v. Rock Royal Co-op., 307 U.S. 533 . . . . Technical details of the milk business are left to

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[43] The government, after raising the spectre of disruption that supposedly would occur if consumers could seek judicial review, dismisses the disruptive effect of producer suits. First, it suggests that producer suits will be "relatively infrequent" because two-thirds of affected producers must approve each order. Pet. Br. at 32 n.18. However, it only takes a minority, even of one, to bring suit. See, e.g., *Brannan* v. *Stark*, 342 U.S. 451 (1952), where five producers challenged an order that had received support of 99.5057% of the voting producers.

The government's additional suggestion that producer suits "are ordinarily limited to challenges to individual market orders," while consumer suits could attack market orders nationwide, is specious. Pet. Br. at 32 n.18. The government cannot seriously assert that a successful producer attack on the reconstituted milk regulations would have less of an impact than the instant case. The 45 individual market orders in this case are, in most material respects, virtually identical. A challenge to the legality of any one of these market orders by a producer, consumer or handler would have nationwide implications.

> the Secretary and his aides. The expenses of litigation deter frivolous contentions. If numerous parallel cases are filed, the courts have ample authority to stay useless litigation until the determination of a test case.

Stark v. *Wickard*, 321 U.S. 288, 310 (1944).

Equally invalid is the government's argument that granting review to consumers would enable a handler to avoid exhaustion of administrative remedy requirements by aligning himself with a consumer to bring suit in district court. The government appears unconcerned with permitting producers to have direct access to the courts, and circumvention in such cases would be much more likely to occur since many handlers also are producers. See, e.g., *Dairylea Cooperative* v. *Butz*, 504 F.2d 80, 82 (2d Cir. 1974) (Dairylea Cooperative, an association of producers, which also acted as a milk handler, was allowed to seek review without exhausting any administrative remedy). Indeed, it appears that handlers financed the very producer suit permitted in *Stark* v. *Wickard*.[44]

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[44] When that case came back to the Court on the merits of the producer claims, three Justices noted that

> the five farmers [producers] whose names appear as challengers of these provisions are not the persons most interested in sabotaging the Boston milk order. Expenses of this litigation, already more than $25,000 by 1949, have been borne by milk handlers [who under the Court's decision in *Rock Royal*, had no standing to bring this suit in their own name].

Brannan v. *Stark*, 342 U.S. 451, 469 (1952) (Black, J., Reed, J., and Douglas, J., dissenting). See also *Cranston* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y. 1968), rev'd and remanded, 428 F.2d 822 (2d Cir. 1970), cert. denied, 401 U.S. 949 (1971). (Judge Timbers rejected claims of two members of a class of producers that the class representatives were inadequate because their cooperative association of producers, some of whose members were defendants, solicited those plaintiffs and paid their counsel).

Moreover, this argument overlooks the fact that it is to the handler's advantage to first pursue his remedy before the Secretary. He may be able to avoid altogether a costly and time-consuming court proceeding, and he also may avoid any money penalties for violation of the challenged order during the pendency of his complaint before the Secretary. 7 U.S.C. § 608c(14). By initiating the administrative review process, a handler may continue his current practices until and unless the Secretary affirms the challenged regulation or initiates injunctive action against such handler.[45]

The government also seeks to avoid judicial review by raising essentially a primary jurisdiction argument, under which it requests deference to the administrative agencies. Pet. Br. at 23. This argument ignores three crucial factors. First, this Court has been able to resolve cases under the AMAA, regardless of the identity of the plaintiffs, involving similar technical claims. See *Lehigh Valley Cooperative Farmers* v. *United States*, 370 U.S. 76 (1962).

Second, as the court of appeals noted, "if Congress intended to channel all challenges through the agency, producers should also be required to follow that route. Yet several courts have concluded that challenges by producers may be heard by courts without first being

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[45] Respondents are not handlers, and there is no evidence on the record in this case that the respondents here are fronting for handlers. Joseph Oberweis, the handler dismissed in this case, operates in a milk market area far distant from those in which respondents reside. Further, respondents' activities for the five years since respondents' petition was filed with the Secretary belies any real or imagined benefit that handlers may obtain by having consumers act as front men or women.

considered by the Secretary." Pet. App. at 26a n.75 (citations omitted).

Third, in this action respondents filed a petition with the Secretary, and the Secretary developed an Impact Statement and other substantive responses at the administrative level. Thus, the Secretary has had ample opportunity to consider these issues prior to review in court.

Even the district court could state no more than "it is *not illogical to infer*, as did the court in *Rasmussen*, that Congress intended to preclude consumers from seeking review." Pet. App. at 66a (emphasis added). This falls far short of the clear and convincing standard of congressional intent required by this Court in *Barlow* to find that consumers who otherwise have standing to obtain judicial review are precluded by the AMAA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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